IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1300 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SURENDRASING PRATAPSING SHEEKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1300 of 1999

MS SADHANA SAGAR for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

Ms Nandini Joshi, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 17/01/2003

ORAL JUDGEMENT

This is an appeal under section 378 of the Code of Criminal Procedure, 1973 (for short, 'the Code')

challenging the judgment and conviction order dated 24.11.1999 recorded by the learned Sessions Judge, Valsad at Navsari in Sessions Case No.15/98 under which the learned Sessions Judge found the present appellant guilty for an offence punishable under section 376 of IPC and sentenced him to suffer R.I. for seven years. The learned Judge also directed that the appellant shall pay fine of Rs.5000/- and in default of payment of fine, the learned Judge has directed the appellant to undergo further R.I. for one year. The learned Judge also directed that the period for which the appellant was in jail be set off against the aforesaid punishment.

2. The facts of the case of the prosecution may be briefly stated as follows:

The father of the girl child, Ramadhar Indrasan Yadav was working on his tea lorry near Paradise Hotel on Highway in 1997 since about 10 years. He was staying with his wife, for daughters and a son. The youngest daughter-Kavita was aged 4 years at the relevant point of time. It is the case of the prosecution that the father of the girl was taking his bath at about 11 a.m. on 2.6.1997 and his wife was also at his residence and that at that time, the mother of the girl child Chanodevi-Exh.26 found the girl child with the present appellant. However, when she went inside the house and returned thereafter she found that the girl child and the appellant both were not present. Since the appellant used to play with the girl child, the mother took it that the appellant must have taken the child to play with her and therefore, an enquiry was made at the hotel and proprietor of the said hotel, Asraf Yashin told her that he has no idea about them. Therefore, the mother went upstairs and found that the girl child was there at the terrace of the hotel having a small nicker in her hand. She also noticed that the appellant present there was arranging his nicker properly. Therefore, she enquired from the appellant as to why he had brought the child there, at which the appellant started quarrelling with her. In the meantime, the mother also noticed that the private part of the girl child was bleeding and the girl child was crying. Therefore, she felt that the appellant had raped her and, therefore, she raised shouts at which many persons had gathered together. Thereafter the father of the girl child took her to the hospital and FIR was also filed.

3. On registration of the FIR, the offence was registered and the appellant was arrested, clothes of the appellant as well as of the girl child were seized and

were referred to the Forensic Science Laboratory for analysis and report. Panchnama of the scene of offence was drawn. Statement of witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed before the court concerned. Since the offence punishable under section 376 of IPC was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions and there the said case was registered as Sessions Case No.15/98.

4. The Learned Judge provided copies of police investigation papers to the appellant and charge was framed for an offence punishable under section 376 of IPC against the appellant. The appellant pleaded not guilty to the said charge and, therefore, evidence was recorded. After conclusion of evidence, the learned Judge recorded further statements of the appellant under section 313 of the Code and opportunity was given to the appellant to explain the facts and circumstances appearing against him in evidence and baring against the appellant. Thereafter, the learned Judge heard the arguments advanced on behalf of the learned Advocates for the parties. Thereafter, the learned Judge found the present appellant to be guilty for the offence under section 376 of IPC. Therefore, the learned Judge heard the appellant on the quantum of sentence and thereafter passed an order of punishment and sentence as aforesaid.

5. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellant has preferred this appeal before this court. It has been mainly contended here that the evidence on record was insufficient to hold the appellant guilty. That the trial court has not properly appreciated the evidence before the court and even the muddamal article was changed during the course of investigation and that fact was not properly appreciated by the court. That the FIR was filed very late and that would go to the root of the case. That, in fact, there was some quarrel between the appellant and the parents of the girl child, on account of which a false story has been made out by the parents of the child. That therefore, in fact, no offence has been committed by the appellant and no offence has been proved against the appellant and therefore, the judgment and conviction order passed by the trial court are illegal and erroneous and deserve to be set aside. It is, therefore, prayed that the present appeal be allowed, the judgment and conviction order of the trial court be set aside and the appellant be acquitted of the aforesaid offence and he be set at liberty forthwith.

On receiving the appeal, it was ordered to be admitted.

6. Today, when the matter was called out, Ms. Sadhana Sagar, learned Advocate appearing on behalf of the appellant stated that she has been appointed by way of legal assistance to the appellant. On the other hand, Ms. Nandini Joshi, learned APP appeared for the State. I have heard the arguments advanced on behalf of both the sides and they have taken me through the evidence and judgment on record.

7. Learned Advocate for the appellant has argued at length that the evidence on record is quite insufficient to connect the appellant with the crime. It is her argument that the proprietor of the hotel on the terrace of which the offence in question is said to have taken place, has not supported the prosecution and therefore, this fact should be appropriately considered by this Court. P.W.4-Asraf Yashin - Exh.15 is the proprietor of the said hotel. It has been deposed by him that on 2.6.1997, he had gone to his hotel at about 11 am. That he had noticed that certain persons had gathered together at the back of his hotel and, therefore, he had gone there. That he found some persons shouting there. He also found that the appellant was at the terrace and mother of the girl child was raising shouts at the back of the hotel. That the girl child was also there and there was some sort of bleeding from her private part. That he brought the appellant from the terrace and the people who had gathered together had beaten him, that he informed the police that the persons gathered together there, have been beating the appellant and, therefore, the police should take away the appellant from that place. He has also stated that he had signed the panchnama without reading the same. The same is produced at Exh.15.

8. In cross-examination, he states that there was some quarrel between the mother and the appellant for collection of water. It is also deposed by him that such quarrel had taken place before two days also. He has further stated that on the date of the incident he had sent his servant going for purchase of vegetables and he had not returned at all. He has also stated that it is not true that the private part of the girl child was bleeding but he stated so at the instance of the people who had gathered together there. On the strength of the above evidence, it has been argued at length by Ms.Sadhana Sagar that this witness has not supported the case of the prosecution to any extent and, therefore, the case of the prosecution cannot be said to have been

proved. While appreciating the evidence of this witness, it is to be noted that he is the master of the appellant and the appellant is the servant of this witness. It is also required to be seen that he has very clearly deposed in his chief-examination that he had brought the appellant from the terrace of his hotel, that he had seen that the private part of the girl child was bleeding and that it is not true that the said part was not bleeding. This shows that the witness has substantially supported the prosecution about the presence of the appellant at the terrace, about the physical condition of the girl child and the place at which the above incident took place. It is true that to some extent he has supported the defence. This is quite natural as the appellant is his servant. At the same time, it is also required to be considered that the evidence is required to be read as a whole. It would not be proper or possible for this court to take out a couple of sentences to dislodge the case of the prosecution. In fact this witness has substantially supported the prosecution on material particulars and, therefore, this aspect of the case cannot be overlooked or thrown away. It is also required to be considered that panchnama exh. 16 at page 95 shows that it was raining at the time when panchnama was drawn and, therefore, terrace of the hotel was full of water. This would naturally show that even if there was bleeding, there would not be visible blood mark because of continuous rainfall. Therefore, the fact that no blood stain was found on the terrace of the Hotel would not negative the case of the prosecution.

9. Then it is also required to be considered that the prosecution has examined the Doctor who had examined the girl child and the Doctor who had examined the appellant. Those two witnesses have also supported the prosecution case. For this purpose, we can take into account the evidence tendered by Dr. Panchal Exh.22. He has stated that he had examined the girl child at 3.15 p.m. on 2.6.1997. The incident took place at 11 a.m. on 2.6.1997 and the girl child was brought to Navsari Civil Hospital at 3.15 p.m. with police yadi. This shows that there was absolutely no delay in bringing the girl child at least to the hospital. It is also required to be stated here that the injury on the private part of the girl child noticed by the Medical Officer Dr Panchal at exh.22 has been clearly described in his evidence as well as in his certificate. The medical certificate shows that as per the history given, the girl child was taken away by one old man and she was found in injured condition. This shows that the aforesaid fact was immediately disclosed to the Medical Officer by the

father of the girl child, who had taken her to the doctor.

10. When the girl child was examined by the Medical Officer, he had found the following condition on the person of the girl child:

"O/E (1) Labia Majora & Labia minora were Oedematons & Tender
(2) Small skin tear about 2 cm between labia minora & labia majora at lower end
(3) Hymen teared at 6'0' clock - position orifice normal. No fresh bleeding present.
Vaginal smear shows no spearmatozoa."

11. It is also required to be seen that the following information has been given by the said Doctor in his certificate which is produced at Exh.23:

"Opinion: No full penetration of Vagina occurred.

Above mentioned injuries can be caused by penis, fingers or any hard object."

The evidence of this witness clearly proves that an act of rape was committed on the said girl child.

12. Then we find evidence of Dr.Ushaben at Exh.24. She has deposed that she had examined the appellant on 3.6.1997. Some injuries were found on the person of the appellant and they were noticed by the said Doctor and the said injuries were recorded in medical certificate at Exh.25. The said Doctor has further deposed that the appellant had mentioned in the case history to her that he was beaten by public when he tried to undress the four year old child. This aspect of the case also supports, to a very great extent, the case of the prosecution.

13. Then there is the evidence of Chanodevi at Exh.26 who is the mother of the girl child. Even she has said that she did not find the appellant and the minor child and therefore, she enquired about the same. That she also felt that the appellant may have taken the child to play with her. However, for enquiring she went to the

hotel and the hotel proprietor Asraf Yashin told her that he has no idea about the same. Therefore, she went upstairs and found the minor child on the terrace with nicker in her hand. She also found the appellant re-arranging his underwear properly. On enquiry, the appellant quarrelled with her. She also noticed that the private part of the girl child was bleeding and the girl child was crying. Thereafter, the girl child was taken to hospital and to the police station. She was cross-examined at length by the learned Advocate for the appellant. During the lengthy cross examination, nothing adverse could be found out which would create any doubt in the testimony of the witness. She has stood the test of cross-examination and during the course of lengthy cross examination, her evidence has not been shaken to any extent. It would be required to be considered that it was suggested to her that because of her quarrel with the appellant, she inserted her finger in the private part of the minor girl child and caused injuries to her. It is true that suggestion made by the learned Advocate during the course of cross examination of the witness would not be binding to the interest of the appellant and no inference can be drawn from such a cross-examination.

14. Nevertheless, it is also a fact that even if this was a mere suggestion on the part of the appellant, it would not be acceptable to any extent. A mother would not cause such type of injury to a minor girl with a view to resolve a small dispute of water between the parents of the child and the appellant. It is highly improbable that the mother would cause such an injury to her minor child and then would file FIR against the appellant. It is more so, when the girl child was found in bleeding condition in an open place which was noticed by Asraf Yashin, proprietor of the hotel, considering the aforesaid aspects and background of the case, it is not possible to hold that a false story has been made out and fabricated by the mother with a view to falsely involve the present appellant in a serious offence of committing rape. Then there is also the evidence of Ramadhar Indrasan Yadav at Exh.14 who has also deposed that when, after finishing his bath, he came out of the house, it was noticed that his wife had gone on the top of the hotel and had noticed the appellant in company of the minor child at the top of the hotel and wife of the witness and mother of the child raised shouts from there. Thereafter he had taken the girl child to the hospital and police station and FIR was filed. Having regard to the facts and circumstances, it cannot be said that the FIR was filed late and in the meantime, the parents had some time to fabricate the story against the appellant.

It has been suggested that there is some difference in the description of the colour of the nicker. Let us ignore the evidence of the Forensic Science Laboratory with respect to the said particular nicker, then also there is sufficient material on record to hold that the appellant had committed rape on the minor girl of four years old.

15. Learned Advocates for the parties have also taken me through the judgment of the trial court and having regard to the reasonings and findings recorded by the trial court and having regard to the aforesaid set of evidence, it can be said that the trial court has properly appreciated the evidence on record. It is also found that no infirmity has been found in evidence and no infirmity has been found on the reasonings and findings recorded by the trial court. Once this court finds that there is sufficient material on record of the trial court to hold the appellant guilty of having committed rape and once it is found that the trial court has not committed any error in appreciation of evidence, there is no alternative but to dismiss the appeal holding that it is meritless. At this stage, learned Advocate for the appellant states that the appellant is aged 65 years at present and he has already undergone R.I. for 5 years and, therefore, that period of sentence should be treated to be sufficient.

16. If a person can commit rape at the age of 60, when there is involvement of a girl of 4 years, it is required to be considered that sometime such minors would carry a very bad image and it may have psychological effect on such a minor girl of 4 years. Such fear and effect may remain life-long with her. Simply because the appellant is aged 65 years at present and simply because he has undergone 5 years imprisonment, it would not be a ground for reducing the quantum of punishment when the matter is argued at length and when the appeal is found to be meritless. Anyway, considering the facts and circumstances and looking to the age of the appellant and looking to the age of the minor girl involved in the offence, the punishment awarded by the trial court cannot be said to be shockingly disproportionate to the gravity of the offence. In that view of the matter, it would not be proper for this court to interfere with the quantum of punishment recorded by the trial court. It is more so, when the trial court had opportunity to record the demeanor of the witness and when the trial court had found that seven years' imprisonment would meet ends of justice.

17. For the foregoing reasons, there is no merit in the appeal and, therefore, the appeal is ordered to be dismissed and the judgment and conviction order of the learned Sessions Judge, Valsad at Navsari are hereby confirmed. The appellant will naturally serve out the remaining sentence.

17.1.2003 [D P Buch, J.]
msp